DOCKET FILE COPY ORIGINAL

ORIGINAL

RECEIVED

JUL 21 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

LAW OFFICES
HALEY, BADER & POTTS
4350 NORTH FAIRFAX DR., SUITE 900
ARLINGTON, VIRGINIA 22203-1633
TELEPHONE (703) 841-0606
FAX (703) 841-2345

POST OFFICE BOX 19006
WASHINGTON, D.C. 20036-9006
TELEPHONE
(202) 331-0606

HENRY A. SOLOMON
ADMITTED IN VA AND D.C.

Our File No.
1024-101-71

July 21, 1993

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Reference: **MM Docket No. 93-51**
New Albany, Indiana

Rita Reyna Brent
File No. BPH-911115MC

Dear Ms. Searcy:

We submit on behalf of Rita Reyna Brent an original and six (6) copies of an "**Opposition To Second Petition To Enlarge Issues Against Rita Reyna Brent**".

If there are any questions in regard to this matter, kindly communicate directly with this office.

Respectfully submitted,

RITA REYNA BRENT

By _____
John Wells King
Henry A. Solomon

Her Attorneys

HAS:dh
Enclosure

No. of Copies rec'd 0+6
List A B C D E

Before The

Federal Communications Commission

Washington, D.C. 20554

In re Applications of	)	MM Docket No. 93-51
	)	
MARTHA J. HUBER, *et al.*,	)	File Nos. BPH-911114ME,
	)	et al.
For Construction Permit for a	)	
New FM Station on Channel 234A	)	
in New Albany, Indiana	)	

TO: The Honorable Richard L. Sippel
Administrative Law Judge

OPPOSITION TO SECOND PETITION TO ENLARGE ISSUES AGAINST RITA REYNA BRENT

RITA REYNA BRENT

Henry A. Solomon
John Wells King

HALEY, BADER & POTTS
Suite 900
4350 North Fairfax Drive
Arlington, VA 22203-1633
703/841-0606

Her Attorneys

Date: July 21, 1993

TABLE OF CONTENTS

SUMMARY

Martha J. Huber's second enlargement petition against Rita Reyna Brent alleges lack of site availability and failures to comply with Section 1.65.

Huber's site-related issue requests are inexplicably and inexcusably late. They are interposed more than 70 days after Huber knew that Brent's site had changed hands. Huber's claim that she complied with the 15-day rule is thus bogus. In any event, Brent remains technically qualified. She never lost her antenna site and was not otherwise required to file a "curative" site amendment. She has enjoyed reasonable assurance continuously since November 1991. There is no basis for adding a site availability issue.

Neither is there any basis for adding a site reporting issue. Within 72 hours after being alerted that her site had been sold, Brent notified the FCC of that event and proffered the new owner's assurance that the site had been continuously available to Brent. To bolster her claim that Brent lacked diligence, Huber relies on cases that underscore, not undermine, Brent's diligence and her resourcefulness.

Brent had not duty to report that her accountant had lost or misplaced her pre-certification joint balance sheet. A balance sheet is a Form 301 document, not a financing document. It simply reflects assets and liabilities at a point in time. If it is lost, misplaced or destroyed, there is no impact on a self-financing applicant's assets and liabilities (*i.e.*, financial ability) giving rise to Section 1.65 reporting obligations. Brent's timely production of a reconstructed balance sheet completes the record.

Before The

Federal Communications Commission

Washington, D.C. 20554

In re Applications of	)	MM Docket No. 93-51
	)	
MARTHA J. HUBER, *et al.*,	)	
	)	
For Construction Permit for a New FM Station on Channel 234A in New Albany, Indiana	)	

TO: The Honorable Richard L. Sippel
Administrative Law Judge

OPPOSITION TO SECOND PETITION TO ENLARGE ISSUES AGAINST RITA REYNA BRENT

Rita Reyna Brent ("Brent"), by her attorneys, respectfully opposes the Second Petition to Enlarge Issues Against Rita Reyna Brent ("Second Petition") filed July 6, 1993, on behalf of Martha J. Huber ("Huber").[1] In support hereof the following is shown:

I. HUBER'S SECOND PETITION IS PROCEDURALLY DEFECTIVE AS IT RELATES TO BRENT'S TRANSMITTER SITE

1. Huber invokes Section 1.229(b)(3) of the Commission's Rules, 47 C.F.R. § 1.229(b)(3), to support her timeliness claim. Section 1.229(b)(3) states that motions for modification of issues which are based on "new facts or newly discovered facts shall be filed within 15 days after

[1] Brent will answer Huber's allegations but will not engage in point-by-point refutation of Huber's extravagant mischaracterizations of Brent's deposition testimony relating to her transmitter site. Excerpts from her testimony were proffered by Huber in Attachment 2 to the Second Petition and may be referred to by the Presiding Judge. Further, Brent regrets that Huber apparently believes that accusatory rhetoric, such as that contained at pages 7 and 8 of the Second Petition, is necessary or appropriate. It is neither.

such facts are discovered by the moving party." Huber ignores § 1.229(c), however. In *Great Lakes Broadcasting, Inc.*, 6 FCC Rcd. 4331, 4332 (1991), the Commission held that "Section 1.229(c) provides for consideration of a late-filed petition to modify issues only if it raises a question of probable decisional significance *and* such substantial public interest importance as to warrant consideration in spite of its untimely filing." The Commission went on to state that

> In *Adjudicatory Re-regulation Proposals*, 58 FCC 2d 846 874 [par.] 23 (1976), the Commission stated that this standard will be strictly construed and that motions for modification of the issues must be filed promptly after the facts are known or could reasonably have been known to the moving party. Finally, in *Valley Telecasting Co. v. FCC*, 336 F.2d 914, 917 (D.C. Cir. 1965), the Court stated that "[o]rderliness, expedition and finality in the adjudicatory process are appropriate weights in the scale, as reflecting a public policy which has authentic claims of its own."

(Emphasis supplied.)

Huber has not complied with the standards set forth in § 1.229(c), and the site-related issues she is attempting to raise are not, in any event, issues of "substantial public importance." *Great Lakes Broadcasting, Inc., supra.* The issues, like Huber's timeliness claim, are bogus.

2. Huber deposed Brent on May 26, and ties her requests for a site availability and site reporting issue to her receipt of Brent's deposition transcript in mid-June.[2] Huber's Second Petition is untimely,

---

[2] At the bottom of page 1 Huber declares that her Second Petition "is based in part upon the deposition of Brent under the standard comparative issue. Counsel for Huber received the transcript of that deposition on June 18, 1993." Huber does not identify the new facts or newly discovered facts on which she relies, however. Huber continues to discuss jurisdiction, but in an entirely different context; *i.e.*, as it relates to her specific allegation that Brent did not comply with § 1.65 by reporting the loss or

however, and does not therefore satisfy the 15-day provision of § 1.229(c)(3). All of the allegedly "new" facts discussed in the Second Petition were either known to Huber early in the discovery process -- in late April 1993 -- or could have been ascertained by her at that time had she been diligent and investigated the information provided by Brent on April 26.

3. Brent testified at deposition, and it is undisputed, that she first learned that her transmitter site had been sold[3] on April 21, 1993, while dining with friends. By Memorandum of April 26, Brent notified the

the Indiana Board of Realtors for five years.[4] Huber had a full opportunity to investigate the facts and circumstances relating to the sale of Brent's antenna site and to file a timely enlargement motion within 15 days--*i.e.*, by the second week in May. Her basic contention is that issues should be added because Brent "lost" reasonable assurance of site availability for one year. She points out that Ms. Harrison acquired the site on April 20, 1992,[5] and that Brent did not obtain a new site letter or report the sale until April 1993. It is clear, however, that such information was not derived from Brent's deposition because Brent testified that when she learned that the land had been sold she did not inquire as to when the sale occurred. Second Pet. at 4; Brent Dep. Tr. 25-26. All of the operative facts were either known to Huber as a result of Brent's April 26 disclosure or could have been reasonably discovered within 15 days thereafter.

5. Huber's contention that Brent's deposition transcript disclosed "new facts or newly discovered facts," within the meaning of § 1.229(b)(3), is therefore bogus. The Presiding Judge should dismiss as grossly out of time Huber's request for site availability and site reporting issues. In any event, as will be demonstrated below, Huber's untimely allegations respecting Brent's antenna site do not raise questions of probable decisional significance and such substantial public interest as to warrant consideration in spite of untimeliness. In fact, the proffered

---

[4] *See* page 4 of Huber's April 9, 1993 integration statement. *See also* Huber's deposition transcript of May 26, 1993 at Tr. 3-4; 7-8; 9. In order to avoid burdening the record, the transcripts are not being proffered at this time, but will be furnished on request.

[5] The sale was completed on April 16, but the deed was recorded on the twentieth.

arguments are so patently inimical to the plain reading of the law that they cast into doubt Huber's *bona fides*.

II. BRENT'S ANTENNA SITE HAS BEEN CONTINUOUSLY AVAILABLE TO HER SINCE SHE FILED HER APPLICATION IN

beyond the four corners of the Harrison site availability letter, in order to complete the record Ms. Harrison restates and ratifies her intent with respect to continuity. Her Declaration is **Exhibit A** hereto.

8. Based on the foregoing, it is evident that Brent had uninterrupted reasonable assurance of site availability from and after November 8, 1991, and continues to have such assurance today.[6]

III. BRENT HAS NOT VIOLATED SECTION 1.65[7]

A. Brent Promptly and Appropriately Reported the Sale of Her Transmitter Site and its Continued Availability

9. Huber claims that Brent violated § 1.65 for "over one year" after her transmitter site was sold. Second Petition at 4. She requests a reporting issue, contending that Brent's alleged failure to notify the FCC in 1992 that the site had changed hands was "essentially equivalent to an intent to deceive the Commission." Second Petition at 8.[8]

---

[6] Although Huber criticizes Brent's role in securing the original reasonable assurance letter she has not suggested that Brent lacked reasonable assurance of her transmitter site when she filed her application.

[7] Huber's reliance on *Merrimack Valley Broadcasting, Inc.*, 99 FCC 2d 680 (1984), at page 7 of the Second Petition is misplaced. As Huber must know, *Merrimack* was decided before the FCC's 1986 decision to eliminate character as a comparative issue. *Policy Regarding Character Qualifications in Broadcasting Licensing*, 102 FCC 2d 1179, 1229-1232, *recon. granted in part, denied in part*, 1 FCC Rcd. 421 (1986), *appeal*

10. It is *undisputed* that Brent did not wait "over one year" to report the sale of her transmitter site to Ms. Harrison. She reported the sale within days after she was alerted to the event: She found out the site had been sold on Wednesday, April 21, 1993; she met with Ms. Harrison on Saturday, April 24; and she reported the sale to the decision maker and parties on Monday, April 26.

11. In a calculated attempt to divert the Presiding Judge's attention from these inconvenient facts and from the truth, Huber commits mischief. She relies on three cases wherein applicants suffered disqualification because of failures to report antenna site problems. By selectively quoting from the opinions, she creates the impression that the cases were decided on facts strikingly similar to those herein and are thus relevant precedents. Analyses of the opinions will, however, verify that principled differentiations exist between Huber's cases and the present case.

12. In *Berea Broadcasting Co., Inc.*, 4 FCC Rcd 8813 (Rev. Bd. 1989), on which Huber appears principally to rely, a curative site amendment was rejected, resulting in disqualification. In July or August 1987, applicant McGill, discovered that his transmitter site had been sold the previous February. Unlike Brent, who contacted the new owner almost immediately after learning of the sale and who notified the FCC on the first business day following such contact, McGill temporized. He waited seven months -- until shortly after the FCC released its Hearing Designation Order -- before communicating with the owners. They advised him that the site was no longer available. McGill's "curative" site

amendment, proffered nine months after he first learned of the land sale, was rejected for lack of good cause. *Id.* at 8814.

13. *Berea* and the present case are radically different on the facts and do not even involve the same legal considerations. In the present case, once she discovered that her transmitter site had been sold, Brent reacted swiftly and responsibly. She was diligent. She confirmed continuous site availability and no "curative" site amendment was required. In *Berea*, McGill's lack of diligence was palpable and the Review Board's action was entirely consistent with precedent. In trying to concoct a case against Brent, *Berea's* disparate facts have escaped Huber's notice.

14. Huber's next case is *62 Broadcasting, Inc.*, 4 FCC Rcd. 1768, 1773 (Rev. Bd. 1989). In *62 Broadcasting* the facts were particularly egregious and were also markedly dissimilar to the facts here. Faced with an explicit filing deadline, an applicant lodged a substantially incomplete "place holder" application and tendered a curative site amendment at the "B" cut-off. Not surprisingly the amendment was rejected and the applicant (who admitted she had not obtained reasonable assurance *ab initio)*, was disqualified. Neither the facts nor the legal considerations involved in *62 Broadcasting* are even remotely germane to the present case.[9]

15. Finally, Huber relies on *Imagists.*[10] Again, she quotes black-letter Commission law, but turns a blind eye to the facts. In *Imagists* an

---

[9] Huber quotes *62 Brodcasting* at page 6 of her Second Petition for the proposition that an available transmitter site "and the concomitant engineering calculations tied" thereto are "central to the application process." 4 FCC Rcd at 1774. Brent does not disagree with that proposition.

[10] *Montgomery County Media Network, Inc. d/b/a Imagists*, 8 FCC Rcd. 2763 (1993).

applicant filed a short-spaced application (November 1984), and was alerted to the problem two months later by an informal objection. Despite having actually received notice that its site was unsuitable the applicant simply sat back and waited until the spring of 1986 before lodging curative site amendments. Not surprisingly, the applicant was disqualified for lack of site availability.

16. If parallels exist between *Imagists* and the present case they are certainly not evident. Brent's transmitter site has always been suitable and available and, as noted previously, when Brent discovered that the site had been sold she promptly reconfirmed its continued (*nunc pro tunc*) availability and gave appropriate notification to the decision maker and parties.

17. All of the cases Huber has relied on, none of which involved § 1.65 reporting issues, hold that an applicant must be diligent and must report deficiencies in its application requiring potential curative amendments without delay or risk disqualification when it attempts to correct those deficiencies.[11] That is black-letter Commission law rooted in the common law doctrine of estoppel by laches. Brent's application was *never* technically deficient, however. No "curative" site amendment was (or is) required here. Significantly, there is nothing to suggest that Brent should have known about the private sale of her transmitter site -- that she turned a blind eye to clues that her site had changed hands. An applicant must make "ordinary efforts to assure that it maintains its site throughout the application process." *Berea, supra.* Brent made such

[11] Had Brent been informed that her site was unavailable and had she provided the prompt notification eschewed by the applicants in *Berea, 62 Broadcasting* and *Imagists,* it is virtually certain that a curative amendment would have been accepted.

efforts and Huber has not provided any facts to the contrary. Lastly, although Huber would equate Brent's lack of actual or constructive knowledge concerning the new ownership with an "intent to deceive" (Second Pet. at 8), there is not a particle of evidence that Brent intended to conceal anything or to deceive anyone. She could not conceal for "over one year" information she indisputably did not have. Once alerted to the fact that her site had changed hands she proceeded swiftly and efficiently to preserve her site assurance and to make appropriate disclosure.[12] In sum, the requested transmitter site reporting issue should not be added.

B. The Loss or Misplacement of One of Brent's Pre-certification Section 301 Documents, a Joint Balance Sheet She Has Produced in Reconstructed Form Was Not a Reportable Event

18. By Memorandum Opinion and Order released June 29, 1993 (FCC 93M-419), the Presiding Judge directed Brent to produce her Form 301 documents and any written cost estimates. She promptly complied. The documents included the balance sheet of Robert and Rita

[12] Huber criticizes Brent for not formally amending her application after April 21 to report anew the fact that the contact person for the transmitter site is Pat Harrison, not Sam Lockhart. Second Pet. at 4. Brent did not believe it was necessary to file a post-designation amendment because she had already notified the decision maker and all parties to the new ownership promptly after learning of it and, of course, supplied them with the reasonable assurance letter fully identifying the new owner. On reflection, Huber might agree. She too has not amended her application to report that she no longer holds a financing letter from Citizens Fidelity Bank and Trust Company Indiana-- renamed PNC Bank, Indiana, Inc., in February 1993. Huber purports to be a regular customer of the bank and presumably knew of the change when it occurred, revealing such information only after her application was designated for hearing. Huber recognized at page 8 of her June 8, 1993 Opposition to Second Motion of Midamerica to Enlarge Issues Against Martha J. Huber, a technical violation of § 1.65 is not disqualifying absent evidence indicating " 'that the applicant intended to conceal the information from the Commission or if the reporting violations are so numerous and serious as to indicate irresponsibility' " (quoting from *David Ortiz Radio Co. v. FCC*, 941 F.2d at 1259).

Brent as of November 13, 1991 (the Form 301 certification date), and joint Federal income tax Forms 1040 for 1990 and 1989, as required by the Form 301 Instructions. Brent also proffered a construction budget, and accompanied her Form 301 documents with other contemporaneous materials.

19. Brent explained at the time she produced her documents that the Brents' joint balance sheet had been reconstructed during the spring of 1993, because the original balance sheet, which she had at the time she certified, and which she entrusted to the custody of the Brents' local accountant, had been lost or misplaced by him. Huber disbelieves Brent's explanation and declares, with sinister speculation and not a shred of substantiation, that there is "severe doubt" that a pre-certification balance sheet ever existed. She has notified the Brents' accountant of her intention to depose him, has initiated further document discovery and will probably interrogate Brent about the matter at her deposition.

20. Huber charges that Brent was "deceitful" in not reporting earlier that her balance sheet had been lost or misplaced by her accountant. She contends that Brent had a pointed disclosure duty under § 1.65. Huber does not reveal the legal underpinnings of the alleged duty, but rests her argument on the *Bodiford* enlargement ruling, a copy of which she attaches to the Second Petition. According to Huber, *Bodiford* is on all fours with the instant case. *Bodiford* is the Presiding Judge's case, and he is undoubtedly familiar with the facts. Nevertheless, Brent takes the liberty of reviewing the pre-enlargement record because like the cases mentioned in connection with Huber's requested site-

related issues, the *Bodiford* facts and circumstances do not conflict with Brent's position that § 1.65 is inapplicable here.

21. The Presiding Judge ruled that Mr. Bodiford, an applicant relying on $70,000 in bank financing, had apparently failed to timely report "material information with respect to lost [bank] commitment letters," a circumstance he first disclosed at deposition. He specified a § 1.65 reporting issue, and in light of suspicious circumstances involving Bodiford and a bank employee named Moore, included an abuse of process issue. (He found, based on deposition testimony, that the facts and circumstances surrounding the lost letters made "the story suspect.") Principled differentiations, legal and factual, exist between this case and *Bodiford*, however, and Huber made no attempt to identify and address them.

22. *Bodiford* recognizes that Mr. Bodiford had a duty to report "the circumstances of the 'lost' letters of commitment." This is because the alleged bank commitments represented a substantial and material source of Bodiford's funding. The consequence of their disappearance was therefore profound: The loss of such evidence of financing results in the *extinguishment of an applicant's financial qualifications.* Put another way, the letters were Mr. Bodiford's assets. No matter how solvent the bank might have been, the lack of a written reasonable assurance letter (in Bodiford's case, two letters) from the bank to applicant Bodiford evincing the bank's present firm intention to lend him money, was potentially fatal. In the absence of an applicant's ability to persuade the bank to reissue the lost, misplaced or destroyed bank loan commitments, such a circumstance would unquestionably constitute a reportable event

under Section 1.65 requiring prompt amendment of the application to reflect *the loss of financial qualifications,* not the mere disappearance or destruction of loan letters. The key distinction is what the documentation represents, not the documents themselves.

23. A bank loan commitment letter is unquestionably a financing document and if it no longer exists the application is no longer accurate and complete and there has been a "substantial change... which may be of decisional significance." § 1.65. In the present case the Presiding Judge has already ruled, consistent with precedent, that the Brents' balance sheet and other Form 301 documents are not "financing documents." *See Memorandum Opinion and Order* (FCC 93M-231), released May 7, 1993, at n. 1 ("Huber cites no authority for the proposition that 'financing documents' under the standard document production include those enumerated for certification of Form 301"). The balance sheet is therefore not equatable to the "lost" loan commitment/financing letters considered in *Bodiford.* Thus, the loss or misplacement of the Brents' 1991 joint balance sheet had no substantive effect whatsoever on Brent's financial qualifications or on the accuracy and completeness of Brent's application. The Brents' assets and liabilities were what they were in November 1991, regardless whether the pre-certification balance sheet remained in the custody of its preparer, was reconstructed 24 hours ago, or vanished from the face of the earth.

24. To be sure, all applicants have a duty to make their Form 301 documents available to the FCC upon request. They have no duty, however, to inform the FCC that they no longer have documents which

cited a single authority to the contrary -- that the loss or misplacement of a pre-certification balance sheet or the other designated Form 301 document of a self-financing applicant such as Brent (*i.e.*, the Brents' paper record of their net income after Federal taxes), has no reporting consequences under § 1.65 because, as stated above, such would not affect the underlying assets and liabilities Brent relied on at the time of certification. The loss, misplacement or destruction of the document is not the lose of the availabilities reflected in that document.

25. The basic efficacy of Brent's financial ability at certification,

timely disclosure of that circumstance. The issues Huber requests should not be added.

Respectfully submitted,

RITA REYNA BRENT

By: _____
Henry A. Solomon
John Wells King

Her Attorneys

Exhibit A

DECLARATION OF PATRICIA B. HARRISON

1. My name is Patricia B. Harrison. I work at 504 Mt. Tabor Road, New Albany, Indiana. My signature appears on the attached letter designated "Attachment 4."

2. On April 24, 1993, I met Rita Brent for the first time. I had not been acquainted with her previously. She told me that Mr. Sam Lockhart had agreed in November 1991, to lease her land for a tower site if she received an FM license from the FCC. I had acquired that land in April 1992.

3. Ms. Brent asked me whether I would continue in effect her November 8, 1991, agreement with Mr. Lockhart. I said I would. By signing the letter I was assuring Ms. Brent that on and after the time I acquired the property she continued to have the same rights she had before my purchase. This is what I intended when I signed the letter, and I continue to intend it.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 17 day of July 1993. Patricia B. Harrison (Patricia B. Harrison).

1024-101

Post-it™ brand fax transmittal memo 7671	# of pages ▸
To Rita Brent	From Henry Solomon
Co.	Co.
Dept.	Phone #
Fax # 502-636-7250	Fax #

ATTACHMENT 4

Nov. 8, 1991

~~Mr. Sam Lockhart~~
~~Georgetown, Ind.~~

Pat Harrison
504 Mt. Tabor Road
New Albany, Indiana 47150

Dear sir:

I am an applicant for FM radio frequency 94.7 to serve New Albany, Indiana. In searching fo a tower site my consulting engineers determined that your property qualifies for this licence allocation. Located south of and adjacent to Interstate 64 approximately ¼ mile east of the Georgetown Indiana exit, the exact co-ordinates on which I propose to build the tower are

85 deg. 54 min. 19 sec. longitude and 38 deg. 17 min. 30 sec. latitude.
(85 degrees longitude, 54 min. 19 sec. and 38 degrees, 17 min. 30 seconds latitude)

The actual tower and supporting guy wire system will require approximately 3 acres. Subject to F.C.C. granting me this broadcast license, I will be willing to lease the aforementioned co-ordinates and the surrounding 3 acres for 1500.00 per year for a period of 5 years. Renewal terms to be negotiated with the actual lease.

I understand that the future business and regulatory conditions may alter or negate your ability to proceed with this project; however, at this time I need your authorization in order to file my timely application.

Kind regards,

Ms. Rita Brent
2106 St. Andrews Rd.
Jeffersonville, Indiana 47130

I accept your proposal subject to the following conditions:

I hereby agree to continue your agreement on the above mentioned land, previously owned by Sam Lockhart, now owned by me. Pat Harrison will have the right to use the leased land in any manner that will not interfere with normal function of the radio tower. Such usage will include but not be limited to the following: billboard sign; farm; access to other property.

signed Pat Harrison date: 4-24-93

CERTIFICATE OF SERVICE

I, Dinah L. Hood, a secretary in the law firm of Haley, Bader & Potts, hereby certify that a copy of the foregoing OPPOSITION TO SECOND PETITION TO ENLARGE ISSUES AGAINST RITA REYNA BRENT was mailed, postage pre-paid, this 21st day of July, 1993 to the following:

The Honorable Richard L. Sippel *